BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF APPLICATIONS BY JOHN E. AND PATRICIA J. SCHROM AND J.M. HANSON TO APPROPRIATE PUBLIC SURFACE WATERS GRANTED BY THE STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, U. S. BUREAU OF RECLAMATION, EAST COLUMBIA BASIN IRRIGATION DISTRICT, QUINCY-COLUMBIA BASIN IRRIGATION DISTRICT, and SOUTH COLUMBIA BASIN IRRIGATION DISTRICT, Appellants, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, and JOHN E. and PATRICIA J. SCHROM, and J.M. HANSON, Respondents.	PCHB Nos. 84-64, 84-67, 84-68, 84-98, 84-102, 84-103, and 84-104 ORDER ON MOTIONS FOR SUMMARY JUDGMENT

On September 6, 1984, respondent State of Washington, Department of Ecology (DOE) filed its Motion for Summary Judgment in the above

matters.

On October 15, 1984, appellants filed their joint Motion for Summary Judgment in the above matters.

Having considered these together with the following:

1. DOE's Memorandum filed September 6, 1984;

2. Affidavit of Eugene F. Wallace dated September 6, 1984;

3. Appellants' memoranda filed October 15, 1984 (two documents with attachments);

4. Affidavit of Russel D. Smith dated October 10, 1984;

5. Affidavit of Tom Cotton dated October 11, 1984;

6. Affidavit of James V. Cole dated October 11, 1984;

7. Affidavit of George E. Maddox dated October 15, 1984;

8. Affidavit of Jerome M. Hanson dated November 29, 1984;

9. Two responsive Affidavits of Theodore M. Olson, each dated December 14, 1984;

10. Responsive Affidavit of James V. Cole dated December 28, 1984;

11. Responsive Affidavit of Edmund Kemp dated December 26, 1984.

And being fully advised, and there being no genuine issue of material fact, NOW THEREFORE, the following are preserved as undisputed fact:

1. Respondents, John E. and Patricia J. Schrom, applied to the State of Washington, on October 2, 1964, to appropriate public surface waters. (Application No. 18735.)

2. Respondent, J.M. Hanson, applied to the State of Washington to appropriate public surface waters on May 3, 1983. (Application No. S3-27552.)

3. The proposed appropriations would divert, at least in part, waters originating with the Columbia Basin Project. Such waters are imported to the area through the operation of the project, and would not be in the area of the proposed diversions, but for the Project.

4. The Bureau of Reclamation does not have present plans to construct recapture facilities below Schroms' proposed diversion on Lower Crab Creek, nor below Hanson's proposed diversion on the unnamed channel running through his property.

5. The proposed points of diversion for Schrom and Hanson are within the exterior boundaries of the Columbia Basin Project.

6. The proposed Hanson diversion would be from a flow of water which appears to originate on Hanson land now being served as a Farm Unit (FU19) by the Columbia Basin Project.

7. The contract between the U. S. Bureau of Reclamation and the affected Irrigation Districts, dated December 18, 1968, and now in effect provides:

> WASTE, SEEPAGE, AND RETURN FLOW WATERS
>
> 24(a). The United States does not abandon or relinquish any of the waste, seepage, or return flow waters attributable to the irrigation of the lands to which water is supplied under this contract. All such waters are reserved and intended to be retained for the use and benefit of the United States as a source of supply for the project. The recapture and/or reuse of waste, seepage, or return flow waters for further utilization by the Districts through the irrigation system shall not be considered as inconsistent with the intent of Article 32.
>
> 24(b). If waste, seepage, and return flow waters from any part of the project not needed for use by the United States for project irrigation water supply can be used on lands within the District, the

> District may supply such water as a part of the supply of the District. Such water supplied by the District at its cost and expense shall be a supplement to its share of the irrigation water supply and shall not affect its prorated diversion right as set forth in subarticle 13(b). (Emphasis added.) (P. 47)

8. If the subject waters originating with the Columbia Basin Project are proprietary waters of the United States, a charge will be made for use of the waters. This charge is intended to offset Project costs. If the subject waters originating with the Columbia Basin Project are public waters, no charge will be made for use of the waters.

9. The Schrom application was granted by temporary permit issued by the State of Washington, Department of Conservation on January 19, 1965. That permit provided:

> Furthermore, an authorization under this temporary permit applies only to the diversion of the naturally occurring waters of Lower Crab Creek. (Emphasis added.)

The respondent, State Department of Ecology, is successor to the State Department of Conservation.

10. The State Department of Ecology issued Orders granting permits under the Schrom application on January 31, 1984, and the Hanson application on April 12, 1984. These Orders do not restrict appropriation to naturally occurring waters.

From these undisputed facts, the Board comes to the following Conclusions of Law:

I

The United States Bureau of Reclamation through its right of appropriation from the Columbia River, has probably applied the waters in question to a beneficial use, namely irrigation. Such use would not, however, terminate the water right. The water right, which encompasses a right to recapture once-used waters for use a second time, may be lost by abandonment. Miller v. Wheeler, 54 Wash. 429, 103 P.2d, 641 (1909); United States v. Haga, 276 Fed. 41 (D. Idaho 1921); Ide v. United States, 263 U.S. 497 (1924). However, abandonment is a question of intent. The intent to abandon and an actual relinquishment must concur, for courts will not lightly decree an abandonment of a property so valuable as that of water in an irrigated region. Miller, supra, at p. 435. We conclude that appellants have shown no intent to abandon the water right under which once-used water might be recaptured for use a second time. The water right of the United States has not been abandoned.

II

1. The Department of Ecology next urges that if there has been no abandonment of the water right, yet the United States has lost possession of the corpus of the water. Such a loss has been characterized as "relinquishment of the very particles of the water" which are discharged without intent to recapture. As a consequence, DOE urges that such particles of water are available, temporarily, to public appropriation until recaptured by the United States or, at least, until the United States manifests an intent to recapture. No

statute or case from Washington State has been cited for this proposition.

2. The proposition that water particles may be relinquished has been cited, in dicta, in a California case, Stevens v. Oakdale Irrigation District, 13 Cal. 2d 343, 90 P.2d 58 (1939). However, the facts in Stevens involved a recapture of once-used irrigation water by the District upon its own land, which was upheld in consonance with U.S. v. Haga, supra. The holding of the case was that Stevens, who had been appropriating the waste water after it left District land, could not compel the District to continue discharging the once-used water.

3. A Montana case, Rock Creek Ditch and Flume Co. v. Miller, 93 Mont 248, 17 P.2d 1074 (1933), cited by DOE, states:

> The corpus of running water in a natural stream is not the subject of private ownership. Such water is classed with light and the air in the atmosphere. It is public juris or belongs to the public. A usufructory right or right to use it exists, and the corpus of any portion taken from the stream and reduced to possession is private property so long only as the possession continues. (Emphasis added.)

This reasoning was used in support of the decision that the imported water once used by the Ditch Co. and allowed to flow from its lands in a natural stream could not be recaptured downstream by a stockholder of the Ditch Co., as against Miller who had begun appropriating it. This constitutes a result arguably at odds with that of Ide v. U.S., supra. The Supreme Court of Montana, recognizing this, distinguished Ide by noting that the waste in Ide was allowed to flow into an otherwise dry ravine, not a natural stream course. This distinction

was unrecognized in Miller v. Wheeler, supra, in Washington State which reached the Ide result of allowing recapture despite the flow of waste into a natural stream. The rule in Montana therefore appears to be one peculiar to that state [and possibly Colorado, see De Haas v. Benesch, 116 Colo. 344, 181 Pac. 2d 453 (1947)].

4. Both the California case of Stevens, supra, and the Montana case of Rock Creek, supra, involved review of attempts to recapture once-used water by the original appropriator. To the extent that appropriation by another had been occurring beforehand, it had left the lands of the original appropriator. Other cases from Utah[1] and Oregon[2] cited by DOE appear to follow this pattern.

5. We are aware of no case in which the original appropriator has been held to relinquish the particles of once-used water until that water has passed from the first appropriator's lands. Moreover, the following is set forth by the Supreme Court of Nevada:

> So long as waste water exists upon the lands of those who have been using the original flow, it is the property of such persons. They may consent to the acquisition of rights therein by other persons upon their own property and in ditches constructed on their own property for the purpose of conveying such rights to the lands of such other parties. But without the original landowner's consent, such water is not subject to appropriation by anyone else. (Emphasis added.) Bidleman v. Short, 38 Nev. 467, 150 Pac. 834 (1915)

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1. Lasson v. Seely, 120 Utah 679, 238 P.2d 418, (1951).

2. Cleaver v. Judd, 238 Or. 266, 393 P.2d 193 (1964).

The following is set forth by the Supreme Court of Oregon:

> ...water is not waste water so long as it remains upon the land of the original appropriator. Barker v. Sonner, 135 Or. 75, 79, 294 Pac. 1053 (1931).

The following is set forth by the Supreme Court of Utah:

> But once the water has passed onto the land of another and out of control of the user, the right to use such water passes to the occupant of the land upon which it is then found, or may become water unused by any one and subject to capture and use by the first person to capture and use it. (Emphasis added.) Smithfield West Bench Irr. Co. v. Union Central Life Ins. Co., 105 Utah 468, 472-473, 142 Pac. 2d 866 (1943).

The following is a statute enacted by the Legislature of New Mexico:

> Artificial surface waters, as distinguished from natural surface waters, are hereby defined for the purpose of this act as waters whose appearance or accumulation is due to escape, seepage, loss, waste, drainage or percolation from constructed works, either directly or indirectly, and which depend for their continuance upon the acts of man. Such artificial waters are primarily private and subject to beneficial use by the owner or developer thereof; Provided, that when such waters pass unused beyond the domain of the owner or developer and are deposited in a natural stream or watercourse and have not been applied to beneficial use by such owner or developer for a period of four (4) years from the first appearance thereof, they shall be subject to appropriation and use; Provided, that no appropriator can acquire a right, excepting by contract, grant, dedication or condemnation, as against the owner or developer compelling him to continue such water supply. (Emphasis added.) NMSA Section 72-5-27 (1978).

6. The original appropriator of the water in question, the United States Bureau of Reclamation, does not hold title to land within

Project boundaries.[3] However, for the purpose of "relinquishment of water particles," the area within Project boundaries should be regarded as the lands, or domain, of the original appropriator.[4] This conclusion is supported not only by important considerations of jurisdictional clarity but rests upon the orderly application of established principles. It assures that where the original appropriator is a federal reclamation project, its status is not less

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3. Respondent, Hanson, holds title to land within Project boundaries. In his circumstances, the water at issue appears to be appropriated by the Project, purchased by Mr. Hanson from the Project, delivered by Project works, applied to a Farm Unit (FU19) on the upper portion of his land, and appears to then seep back to the surface and flow to a lower portion of his land where he proposes to divert it. If this is so, he urges that he, as landowner, not the United States as original appropriator, may recapture this water on the basis that it would be water that he purchased and which has not left his land. We express no opinion upon this claim since it raises a proprietary dispute between the United States as vendor and Mr. Hanson as purchaser of Project water. The claim does not provide support for a finding that the subject water is public and thus subject to appropriation under the permits at issue.

4. See Cleaver v. Judd, supra, at p. 271 wherein a similar rule is announced on the issue of recapture:

> The only question remaining is whether the facts bring the instant case within the principle that an owner may recapture waste and seepage water before it leaves his land. An irrigation district, being a municipal corporate entity, is regarded as an owner for the purpose of applying this principle.

Then, at pp. 272-273:

> In the case at the bar the waste and seepage water was recaptured within the defendent irrigation district. We regard it as immaterial that a part of the waste and seepage may have had its source in one of the other irrigation districts in the Owyhee Federal Reclamation Project. For the purposes of applying the principle that an owner may recapture waste and seepage water, the project may be treated as an entity.

than that of original appropriators who are private parties.

7. We hold that the subject waters originating with the Columbia Basin Project have not left the lands of the original appropriator. This being the case, we hold consistent with the weight of authority, that these waters have not become public waters through the common law doctrine of relinquishment of water particles.

III

The subject permits, purporting to authorize appropriation of these waters as public waters, should be reversed.

ORDER

The appellants' Motion for Summary Judgment is granted. The respondent's Motion for Summary Judgment is denied.

The Department of Ecology Orders dated January 31, 1984, and April 12, 1984, granting public surface water permits to respondents Schrom and Hanson under Applications Numbers 18735 and S3-27552 are each, hereby, reversed.

This Order is without prejudice to the subsequent granting of these Applications in a manner consistent with this Order and other legal requirements.

DONE at Lacey, Washington, this 7th day of February, 1985.

POLLUTION CONTROL HEARINGS BOARD

Lawrence J. Faulk 2/7/85

LAWRENCE J. FAULK, Chairman

Gayle Rothrock

GAYLE ROTHROCK, Vice Chairman

William A. Harrison

WILLIAM A. HARRISON
Administrative Appeals Judge